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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-6893

J. D. GILSON,
Plaintiff-Petitioner,
vs.
MARVIN MACKLIN, etc.,
Defendant-Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeal properly dismiss petitioner's civil rights complaint when said complaint did not allege any facts showing a violation of any federally-protected right by the respondent?

2. Should the non-final, non-appealable order of the District Court be reviewed by this Court by a petition for a writ of certiorari?

STATEMENT OF THE CASE

On July 23, 1970, petitioner filed his "Civil Rights Complaint" in the United States District Court for the Central District of California. A true and correct copy of this complaint is attached to this brief and marked Exhibit A.

The complaint alleged some legal materials were taken from petitioner by "the officer in question" when he was transferred from the Los Angeles County Jail to the Wayside Honor Rancho; that he asked for the materials when he was transferred to another prison from Wayside; that this request was refused. The complaint is silent as to what person was requested to return the materials. Other than using the word "the officer in question," the complaint did not mention the respondent.

The complaint prayed for an order requiring the return of petitioner's materials, for $20,000 in general damages, and $30,000 in punitive damages. After considering the complaint, the District Court dismissed it holding "There was never any order authorizing plaintiff to proceed in forma pauperis in the action. A careful reading of the complaint does not disclose any facts sufficient to constitute a claim under the Civil Rights Statute against Deputy Sheriff, Badge No. 3225. Nothing is alleged against such Deputy Sheriff, Badge No. 3225, other than that he received miscellaneous papers when plaintiff was booked at the Wayside Rancho Honor Farm in Los Angeles County, California." A

true and correct copy of this order is attached to this reply and marked Exhibit B.

The appellant appealed his case to the Court of Appeal for the Ninth Circuit which affirmed the order of the District Court and denied petitioner's motion for leave to appeal in forma pauperis. The Court of Appeal stated the reasons for its ruling to be "for the reasons expressed by Judge Whelan in the above order. Further, it does not appear that the order dismissing the complaint was a final order." A true and correct copy of the order of the Court of Appeal is attached to this reply and marked Exhibit C.

PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED

Assuming petitioner's complaint is construed as a complaint brought under the provisions of 42 U.S.C. 1983, it did not state the elements of a cause of action for an action brought under that section. No facts were alleged that the petitioner was deprived of any federally-protected right. Allegations showing such a deprivation are essential to state a claim under 42 U.S.C. 1983. *Adickes v. Kress & Co.*, 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598; *Monroe v. Pape*, 365 U.S. 167, 171, 5 L. Ed. 492, 81 S. Ct. 473.

The possession of legal materials by a state prisoner is subject to reasonable restriction. *Brown v. Duggar*, 456 F. 2d 1260 (5th Cir. 1972); *Hatfield v. Balleaux*, 290 F. 2d 632 (9th Cir. 1961), cert. den; 368 U.S. 862,

7 L. Ed. 2d 59, 82 S. Ct. 105; *Gittlemacker v. Prusse*, 428 F. 2d 1 (3rd Cir. 1970); *Glasshofer v. Sennett*, 444 F. 2d 106 (3rd Cir. 1971). Furthermore, in this case, the complaint states no facts showing the petitioner suffered any detriment whatsover as a result of having to turn over his legal materials to respondent.

REVIEW BY CERTIORARI OF A NON-APPEALABLE ORDER IS UNNECESSARY.

The order of the District Court dismissed petitioner's complaint in this action. An order dismissing a complaint, but not dismissing the action, is not appealable. *Jackson v. Nelson*, 405 F. 2d 872, 873 (9th Cir. 1968); *Hemstreet v. Schude*, 459 F. 2d 49 (9th Cir. 1972). It is possible the complaint could be cured by amendment. *Hurst v. State of California*, 451 F. 2d 350, 351 (9th Cir. 1971). Normally, the Court will not grant certiorari to review an interlocutory order. "[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U.S. 372, 384, 37 L. Ed. 486, 13 S. Ct. 758. Petitioner only must amend his complaint in the District Court in order to receive all the relief he is seeking in this Court.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

MICHAEL H. DOUGHERTY,
Deputy County Counsel
Attorneys for
Defendant-Respondent

EXHIBIT "A"

J. D. Gilson
P. O. Box No. B-25432
Represa, California 95671

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 70-1620-FW
Civil Rights Complaint

J. D. Gilson,)
Plaintiff,)
vs.)
Marvin Macklin, Deputy Sheriff,)
Badge No. 3225,)
Defendant.)

JURISDICTIONAL STATEMENT

Plaintiff is a resident/citizen of the United States and resides in the State of California. The defendant is a citizen of the United States and a resident of the State of California, and an agent of the Los Angeles County Sheriffs Department by virtue of his respective employment of and to that County.

That this action arises under one or more of the following set fourth United States constitutions and United States statutes, U.S. constitution, article 3, §2;

article 4, §1; Amendments 1, 4, 6, and 14. United States codes, title 28, §§1331 and 1343; title 18, §§242-243, title 42, §§1981-1988 et. seq.

That the defendant was at all times mentioned and pertinent to this action, acting for and as an agent of the county of Los Angeles. That all times herein mentioned the defendant was acting under color of law; occupying the respective position of Deputy Sheriff badge No. 3225.

That the clear and concise acts and omissions, specific intents and overt acts carried out are to deny and deprive plaintiff of his respective constitutional and Statute rights and to discriminate against the respective plaintiff.

AMOUNT IN CONTROVERSY

That the amount incontroversy is in excess of the sum of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

THAT THE SPECIFIC DEFENDANT IS:

Deputy Sheriff, Badge No. 3225. Place of employment: Wayside Rancho Honor Farm, Los Angeles County, Los Angeles, California.

Petitioner is unable to make out the Name of the officer, "Badge No. 3225," who signed the property slip. Therefor, the property slip is attached hereto as exhibit "A" and made a part of this petition for

the purpose of establishing identification of defendant and any other purpose it may serve.

FOR A FIRST CLAIM
STATEMENT OF THE CASE

On January 23, 1970, petitioner was transfered from the Los Angeles County Jail to Wayside Rancho Honor Farm and placed under maximum custody.

Petitioner was booked under the number 880-179 and apparently from the showing on the face of the property slip, was booked under the name of J. D. Gibson. However, petitioners true name is J. D. Gilson.

When petitioner was booked the officer in question took 10 Volumns of transcripts, 1 (one) opening brief of petitioners trial, the opinion that the appellate court handed down, a copy of each of the motions that petitioner had filed in Superior court, three (3) legal tablets of law that contained cases pertaining to petitioners case, letters that petitioner had received from his attorney and from the court, letters from friends who petitioner no longer has contact with, because he does not remember the addresses, various other legal and personal papers pertaining to petitioners case.

When petitioner was transferred from the Wayside Rancho honor farm to the guiding center at Chino, California on the 27th of January 1970, he asked for his legal documents, to be returned to him, but was refused. Since that time petitioner has written two

(2) letters requestion/demanding the return of his legal and personal papers, but has received no response whatsoever.

The aforementioned documents papers etc. are very important and essential to petitioner, and, he has now been denied and deprived of them for over four (4) months. It is very apparent that he is being denied and deprived of these documents intentionally to prevent his use of them.

Wherefor: plaintiff Gilson prays for the sum on Twenty Thousand ($20,000.00) Dollars in general and specific damages from this defendant; for such reasonable value as the court may determine for the preparation of legal documents, labor, legal expense, etc., as may be proved at time of trial.

Petitioner further prays for an order demanding the immediate return of the above mentioned articles.

FOR A SECOND CLAIM
STATEMENT OF THE CASE

The plaintiff realleyes and reaffirms each and every one of the previous set forth allegations for general and specific damages hereinbefore set forth. Additionally, as and for punitive damages plaintiff seeks the sum of thirty Thousand ($30,000.00) Dollars from the defendant for the overt acts and omissions in the deprivations of individual rights of the plaintiff as have been hereinbefore set forth in detail.

Additionally, plaintiff seeks such other and further relief as to the court and/or jury may seem just and meet/fitting to and for the instant complained of matters, at time of trial including the deprivation of correspondence with friends, because the addresses of plaintiffs friends were taken and not returned.

DATED: June 3, 1970.

Respectfully submitted,

/s/ J. D. GILSON

VERIFICATION

I, J. D. Gilson do respectfully declare under the penalty of perjury that all matters, events, etc., as are herein set forth and included are true and correct, to the best of my knowledge and belief.

/s/ J. D. GILSON
in Pro. Per.
P.O. Box B-25432
Represa, California 95671

EXHIBIT "B"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J. D. GILSON, Plaintiff,	)	No.
vs.	)	70-1620-FW
MARVIN MACKLIN, LOS ANGELES COUNTY SHERIFF, BADGE NO. 3225, Defendant.	)	

ORDER DISMISSING COMPLAINT

In this action plaintiff filed what he terms as a civil rights complaint in propria persona after he had been permitted to file the action without payment of the filing fee. There was never any order authorizing plaintiff to proceed in forma pauperis in the action. A careful reading of the complaint does not disclose any facts sufficient to constitute a claim under the Civil Rights Statute against Deputy Sheriff, Badge No. 3225. Nothing is alleged against such Deputy Sheriff, Badge No. 3225, other than that he received miscellaneous papers when plaintiff was booked at the Wayside Rancho Honor Farm in Los Angeles County, California. There is no diversity jurisdiction. This Court finds that the complaint is frivolous with-

in the meaning of Title 28, United States Code, Section 1915(d), and that for such reason such complaint should be dismissed. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint herein is dismissed.

DATED this 6th day of December 1971.

FRANCIS C. WHELAN
United States District Judge

EXHIBIT "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. D. GILSON,	)	
Plaintiff-Appellant,	)	MISC.
vs.	)	6041
MARVIN MACKLIN, Sheriff	)	(DC
Badge No. 3225,	)	70-1620
Defendant-Appellee.	)	FW)

ORDER

Appellant, a California state prisoner, moves for leave to appeal in forma pauperis from an order of the district court entered on December 9, 1971, dismissing a civil rights complaint.

The motion is denied for the reasons expressed by Judge Whelan in the above order. Further, it does not appear that the order dismissing the complaint was a final order.

RICHARD H. CHAMBERS
OLIVER D. HAMLIN
United States Circuit Judges